OCT 29 1952

In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 423

LOIS FAUBOT, and LOIS FAUBOT as Next Friend of NANCY FAUBOT ACHENBACH, a Minor,

Petitioners,

v.

VERA FAUBOT MOORE; LENA FAUBOT; LOREN V. DEVILBISS; JESSIE DEVILBISS; ALICE J. BARBER; R. L. ZOOK; COMMERCIAL BANK OF WAYNOKA, OKLAHOMA, a corporation; the Heirs, Executors, Administrators, Devisees, Trustees and Assigns, Immediate and Remote, of THOMAS J. FAUBOT, deceased; FEDERAL LAND BANK OF WICHITA; THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES; SADIE M. JONES; and CITY OF WAYNOKA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2-5
Specification of Errors to Be Urged	5-8
Statement	8-12
Reasons for Granting the Writ	12-25
Conclusion	25

Page

Adler v. Fenton, 24 How. (U. S.) 407, 16 L. Ed. 696 7

Apple v. Bridgman, 122 Okla. 196, 253 Pac. 1003 6

Apple v. Bridgman, 122 Okla. 196, 253 Pac. 1002 15, 17

Echols v. Reesburgh, 62 Okla. 67, 161 Pac. 1065 24

Merchants Southwest Fireproof Warehouse Co. v. Johnston, 113 Okla. 146, 243 Pac. 186 23

News Dispatch Printing and Audit Co. v. Board of Commissioners of Carter County, 132 Okla. 216, 270 Pac. 2 23

Phoenix Ins. Co. v. First Nat. Bank, 129 Okla. 204, 264 Pac. 142 6, 15, 18, 19

Smith v. Braley, 76 Okla. 220, 184 Pac. 586 7, 15, 18

Sturges, et al. v. Portis Mining Co., 206 Fed. 534 16, 19, 20

Title 12, Oklahoma Statutes Annotated:

Sec. 169 24

Sec. 701 23

Title 24, Oklahoma Statutes Annotated:

Sec. 3 13, 21

Secs. 5, 7, 8, 9 14, 15, 16, 21

Sec. 10 15, 16, 21

28 U. S. C., Sec. 1254 (1) 2

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Lois Faurot and Lois Faurot as next friend of Nancy Faurot Achenbach, a minor, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on May 13, 1952.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 183) is reported in *196 F. 2d 883.*

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1952 (R. 188). The time to file a petition for rehearing was by order extended to June 10, 1952 (R. 188). A petition for rehearing filed June 10, 1952 (R. 188) was denied on June 16, 1952 (R. 191). Upon the duly and timely motion of Petitioners, the time to file this petition was extended to and including October 29, 1952. The jurisdiction of this Court is invoked under *28 U. S. C., Section 1254 (1).*

QUESTIONS PRESENTED

1. Whether, under the laws of Oklahoma, a judgment of a state court of general jurisdiction in favor of a general judgment creditor is valid and effective to divest the fee simple title of the estate of the deceased grantee of the judgment-debtor, and to reinvest the judgment-debtor with such fee simple title, where in the suit of the judgment-creditor, resulting in such a judgment, the judgment-debtor grantor and the administratrix of the estate of the deceased grantee, the defendants, did not join issue and litigate the title to the lands involved.

2. Whether, under the laws of Oklahoma, a judgment of a general judgment-creditor against his judgment-debtor, in a state court of general jurisdiction, can inure

to the use and benefit of the judgment-debtor, his heirs and assigns, as their muniment of title in and to lands theretofore conveyed by the judgment-debtor to a deceased grantee by general warranty deed duly recorded.

3. Whether, under the laws of Oklahoma, a judgment of a state court of general jurisdiction, in favor of a general judgment-creditor and against its judgment-debtor, is valid and effective as a muniment of title in lands of the judgment-debtor, his heirs and assigns, forever, where the judgment-debtor recovered no judgment against his grantee and did not plead or seek any affirmative relief against the estate of his deceased grantee in the action resulting in a judgment for the judgment-creditor.

4. Whether, in an action brought in a state court of general jurisdiction in Oklahoma by a general judgment-creditor against its judgment-debtor, in which action the administratrix of the estate of the deceased grantee of the judgment-debtor is joined as a party defendant, the title to the land was tendered and became a justiciable issue, where the judgment-debtor defendant filed only a demurrer to the action of the judgment-creditor and did not plead or seek any affirmative relief against the estate of his deceased grantee, and at the trial, as disclosed by the judgment, neither the judgment-debtor nor the administratrix of the estate of the deceased grantee joined or litigated issue thereon.

5. Whether a judgment of a state court of general jurisdiction in Oklahoma has any force or effect, after the first

judgment, upon which the judgment-creditor predicated its second action, was voluntarily paid in full by the judgment-debtor and a release of the first judgment entered of record, and no attachment, foreclosure or sale was ever had by the judgment-creditor under its second judgment.

6. Whether a judgment-creditor in the state of Oklahoma, a stranger to a land title, has a remedy beyond subjecting the land conveyed by the judgment-debtor to a lien for the collection of the personal, money-judgment rendered against the judgment-debtor grantor.

7. Whether a state court of general jurisdiction in Oklahoma, with notice of the death of the intestate grantee contained in the pleadings, can enter a valid judgment divesting the title of the deceased grantee's heirs in and to lands conveyed to the deceased grantee by the judgment-debtor by a general warranty deed, duly recorded and valid on its face, at the instance of a judgment-creditor.

8. Whether the voluntary payment and release of the money judgment of the judgment-creditor by the judgment-debtor discharged, voided and extinguished the second judgment of the judgment-creditor in all things, which second judgment was ancillary to and was predicated upon the first judgment.

9. Whether a judgment of a general judgment-creditor against its judgment-debtor, in a state court of general jurisdiction in Oklahoma, can divest the fee simple title of the surviving wife and minor daughter of a deceased

grantee, who died intestate, where the action is against the administratrix of the estate only.

10. Whether the minor child, Nancy Faurot Achenbach, was duly and properly before the Court, in the second suit of the Commercial Bank, by, through and under the defendant, Lois Faurot, administratrix of the estate of Clyde Faurot, deceased, where the minor's title vested with the death of her father under the laws of descent and distribution of Oklahoma.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred (R. 188-191):

1. In not holding that "a judgment or decree which cancels a conveyance because executed in fraud of creditors does not have the effect, as between the grantor and grantee in such conveyance, of divesting the grantee of title and revesting title in the grantor."

2. In not holding that the Commercial Bank, in its second suit in the State Court, "merely sought cancellation of the warranty deed from Thomas Faurot to Clyde Faurot on the ground that it was executed in fraud of the bank as a creditor of Thomas Faurot, and absent any effort on the part of either defendant in that action to present and have litigated a hostile claim of title against the other," the Court was without jurisdiction to divest the estate of Clyde Faurot, or his heirs, of title to the land and to revest such title in Thomas Faurot.

3. In holding: "But the cause of action pleaded the petition in that cause (referring to the second suit of the bank) was not limited to that single purpose. In addition to alleging lack of fair and valuable consideration and a fraudulent intent and purpose to hinder and delay the bank in the collection of its debt, the complaint alleged in plain and categorical language that the land was in fact and in equity owned by Thomas Faurot. That sweeping allegation amounted to an implied negation of title and ownership in the estate of Clyde Faurot or his heirs."

4. In overlooking, disregarding and ignoring the plain and categorical descriptive reference language set forth in the paragraph next preceding the prayer in the petition of the Commercial Bank, "by reason of the facts hereinabove set forth, and by reason of the transfer to the said Clyde Faurot being made in violation of the laws of the State of Oklahoma:"

> "Plaintiff further alleged and says that said property so transferred to the said Clyde Faurot is in fact and in equity owned by the said Thomas Faurot by reasons of the facts hereinabove set forth, and by reason of the transfer to the said Clyde Faurot being in violation of the laws of the State of Oklahoma, and that plaintiff is entitled to a judgment of this court canceling, vacating and setting aside said deed and transfer adjudging the said Thomas Faurot to be the owner thereof."

5. In holding that the cause of *Apple v. Bridgman, 122 Okla. 196, 253 Pac. 1003*, and *Phoenix Insurance Co. v. First National Bank, 129 Okla. 204, 264 Pac. 142*, are not controlling precedents for this case.

6. In holding that the case of *Smith v. Braley, 76 Okla. 220, 184 Pac. 586*, is not a precedent for this case.

7. In holding that the case of *Adler v. Fenton, 24 How. (U. S.) 407, 16 L. Ed. 696*, is not a precedent for this case.

8. In holding: "The question of title having been expressly injected into the case, the court having jurisdiction to adjudicate it, and the court having determined it in the manner indicated, the judgment was not open to collateral attack in this proceeding for want of jurisdiction of the subject matter."

9. In not holding that the only right or remedy which the Bank asserted or was in position to assert in the second action in the State Court was to subject the land to its judgment lien for the collection of the personal judgment rendered against Thomas Faurot in the first action of the bank in the State Court which judgment was subsequent to the transfer of the property from Thomas Faurot to Clyde Faurot.

10. In holding: "And by equally clear terms the prayer expressly sought an adjudication that Thomas Faurot was the sole owner of the land in fee simple. Manifestly, the question whether Thomas Faurot, on one hand, or the estate of Clyde Faurot, or his heirs, on the other, owned the land was tendered and became a justiciable issue in the case. The court was clothed with general equity jurisdiction to adjudicate and determine the issue."

11. In recognizing and accepting the journal entry of March 3, 1936, as divesting the estate of Clyde Faurot of

all right, title and interest, and as revesting Thomas Faurot with fee simple title in and to the property in question, in that such finding and holding, is in effect, depriving the estate of Clyde Faurot, deceased, his widow and minor child, appellants herein, of property without due process of law, as opposed to the provisions of the Constitution of the United States of America.

12. In not holding that "Nancy Faurot Achenbach, a minor, was not served by the Commercial Bank in the second suit and since no one can waive service for a minor or enter an appearance without service of summons having first been made upon said minor, that the judgment is void as to Nancy Faurot Achenbach;" and in effect the Commercial Bank Judgment takes property from a minor child without due process of law, as opposed to the provisions of the Constitution of the United States of America.

STATEMENT

The essential and material facts in this case, in their chronological order, are as follows:

July 14, 1934:

The Commercial Bank of Waynoka, Oklahoma, filed suit against Thomas Faurot in the district court of Woods County, Oklahoma, to recover a personal money judgment upon his liability as an endorser of two promissory notes owned by the Bank (R. 153-154).

August 6, 1934:

While the above suit was pending, but before judgment, Thomas Faurot executed and delivered a general warranty deed to his son, Clyde Faurot, conveying land, the title to which is presently in controversy,

comprising 1,120 acres, more or less, situated and located in Woods County, Oklahoma. This warranty deed was duly recorded in Woods County, as required by law (R. 6).

October 9, 1934:

Clyde Faurot died intestate, as a result of an automobile accident, leaving surviving his wife, Lois Faurot, and one-year-old daughter, Nancy Faurot (R. 72, 124).

November 12, 1934:

Lois Faurot was appointed and qualified as administratrix of the Estate of Clyde Faurot, deceased (R. 128).

April 10, 1935:

Civil Appearance docket entry in the suit of the Commercial Bank against Thomas Faurot: "Enter order rendering judgment as per J. E." (R. 147.) (It will be noted that this docket notation does not state in whose favor the judgment is to be entered or the character or nature of any such judgment.) (R. 147.)

September 10, 1935:

The Commercial Bank of Waynoka, claiming to be a judgment-creditor of Thomas Faurot, filed a second suit in the District Court of Woods County, Oklahoma, predicated upon its first purported judgment against Thomas Faurot, seeking to vacate the General Warrenty Deed conveyance from Thomas Faurot to Clyde Faurot dated August 6, 1934, as to the entire 1,120 acres of land as being in fraud of creditors and prayed that the deed of conveyance by Thomas Faurot to Clyde Faurot be cancelled, vacated and set aside, and held to be of no force and effect, and that the fee simple title to this land be revested in Thomas Faurot and that the title of Thomas Faurot be quieted as against Lois L. Faurot, administratrix of the estate of Clyde Faurot, deceased (R. 170-172).

October 10, 1935:

An attorney, R. M. Chase, filed identical demurrers for defendants, Thomas Faurot and Lois Faurot, administratrix of the estate of Clyde Faurot, deceased (R. 174). (No other pleadings were filed for or on behalf of either defendant.) Administratrix, Lois Faurot, was never served with citation (R. 151, 173).

March 3, 1936:

Civil Appearance Docket entry: "Enter order rendering judgment for plaintiff as per J. E." (R. 151.)

March 19, 1936:

Civil Appearance Docket: "File and enter Journal Entry .10, Recording 1.20." (R. 151, 175-178.)

April 1, 1936:

Within less than thirty days of the entry of said second judgment, Thomas Faurot started conveying the lands in question, relying on this second judgment of the bank as his muniment of title. (R. 168-169.) (No attachment, foreclosure or sale was ever had under this judgment.)

April 3, 1938:

Thomas Faurot conveyed 27 acres of land in question to Respondent, The City of Waynoka (R. 167).

September 6, 1938:

First judgment of Commercial Bank of April 10, 1935, ~~delivered~~ released upon full payment of judgment (R. 159).

November 6, 1942:

The Journal Entry of the first purported judgment of the Commercial Bank against Thomas Faurot filed and entered (R. 147, 158-159).

December 30, 1948:

Thomas Faurot, through his attorney-in-fact, daughter, Vera Moore, conveyed homestead to Lena S. Faurot (R. 161, 163-164).

December 30, 1948:

Thomas Faurot conveyed balance of land to Respondents, Loren V. DeVilbiss and Jessie DeVilbiss for the sum of $15,000.00 (R. 151, 164-165).

March 1, 1949:

Respondent, Lena S. Faurot, morgtaged the land conveyed to her to The Equitable Assurance Society of the United States (R. 34-39).

August 4, 1949:

Respondents, Loren V. DeVilbiss and Jessie DeVilbiss, mortgaged land to Federal Land Bank of Wichita, Kansas (R. 11-15).

September 14, 1949:

Thomas Faurot died in Wellington, Kansas (R. 101).

October 16, 1950:

Petitioners filed their amended complaint in this proceeding in the United States District Court for the Western District of Oklahoma seeking to quiet title, declare heirship, deliver possession of the lands and to recover land rentals (R. 1-7).

July 11, 1951:

The trial court entered its findings of fact and conclusions of law (R. 51-62) holding, in effect, that the second judgment of the Commercial Bank "was a muniment of title on which defendants (respondents) and their predecessors in title were entitled to rely"; that "the journal is silent as to any fraud which might have been perpetrated upon creditors, and it cannot be said as a matter of law that the court ordered a re-

conveyance upon the grounds of fraud, rather than the alternative theory that the property was necessary because of the death of the trustee, Clyde Faurot."

May 13, 1952:

The Court of Appeals, in its opinion, found and held that the second judgment of the Commercial Bank was a sufficient and valid muniment of title for Respondents; that the title to the lands became a justiciable issue between Thomas Faurot and the estate of Clyde Faurot, in the second suit of the Bank.

All of the Respondents rely upon the validity and effectiveness of the second judgment of the Commercial Bank as their sole muniment of title. Petitioners rely upon the duly recorded General Warranty Deed from Thomas Faurot to Clyde Faurot as their muniment of title, plus the laws of succession of Oklahoma.

No limitation or adverse possession claims are asserted or are available to Respondents.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals in this case is precedent-shattering and finds no support in either the statutory or case law of Oklahoma, as is clearly evident by the respected opinion of the Court of Appeals. If this decision is permitted to stand as the law of the land, every fee simple title in lands conveyed by general warranty deed in Oklahoma is threatened and jeopardized. This respected opinion unwittingly serves as a judicial invitation to fraud

and collusion between a creditor and his debtor to divest the grantee of the debtor and to reinvest the debtor-grantor with such fee simple title in lands by and through a collusive action by the creditor against his debtor.

This decision gives to general judgment-creditors and judgment-debtors, alike, rights and remedies not given to them by Oklahoma law.

The Commercial Bank of Waynoka, Oklahoma, in its second suit in the state court against its judgment-debtor, Thomas Faurot, and Lois Faurot administratrix of the estate of Clyde Faurot, deceased, grantee, was a general money-judgment creditor of Thomas Faurot, if, in law it was, and nothing more. As a general judgment-creditor, the bank had only one cause of action, right or remedy it could assert, or it was in a position to assert; namely, to subject the land conveyed by its debtor, Thomas Faurot, to Clyde Faurot by general warranty deed, to a lien for the collection of the bank's personal judgment recovered against Thomas Faurot in the bank's first suit against Thomas Faurot in the State Court. This fundamental and basic principle the Court of Appeals failed and refused to recognize, although fully supported by the statutory and case law of Oklahoma.

Title 24, Oklahoma Statutes Annotated, Section 3:

> "FRAUD ONLY INVALIDATES CONTRACTS OF DEBTOR—In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."

Title 24, Oklahoma Statutes Annotated, Section 5:

"TRANSFERS WITH INTENT TO DEFRAUD—Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor, and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Title 24, Oklahoma Statutes Annotated, Section 7:

"RIGHT OF CREDITOR TO AVOID ACT OR OBLIGATION FOR FRAUD—A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process of his right to take the property affected by the transfer or obligation."

Title 24, Oklahoma Statutes Annotated, Section 8:

"FRAUDULENT INTENT A QUESTION OF FACT—ABSENCE OF CONSIDERATION—In all cases arising under the following section, or under the provisions of this chapter, except as otherwise provided in the second preceding section, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration."

Title 24, Oklahoma Statutes Annotated, Section 9:

"CONVEYANCE VOID, WHEN—Every instrument other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or in-

cumbrances thereon, is void as against every purchaser or incumbrancer, for value of the same property, or the rents or profits thereof."

Title 24, Oklahoma Statutes Annotated, Section 10:

"INSTRUMENTS WITHOUT CONSIDERATION OR MADE IN BAD FAITH—Every conveyance of real estate or any interest therein, and every mortgage or other instrument in any way affecting the same, made without a fair and valuable consideration, or made in bad faith, or for the purpose of hindering, delaying or defrauding creditors, shall be void as against all persons to whom the maker is at the time indebted or under any legal liability."

Title 24, Oklahoma Statutes Annotated, Section 7, above quoted, specifically voids the judgment entered in the second suit of the bank, insofar as said judgment purported to divest the estate Clyde Faurot of its fee simple title to the land in question, and to reinvest Thomas Faurot, his heirs and assigns, forever, with said fee simple title in said land.

The decision of the court below in the instant case is in direct conflict with the statutory law of Oklahoma relating to debtor-creditor relations, particularly *Title 24, Oklahoma Statutes Annotated, Sections 3, 5, 7, 8, 9 and 10.*

II

The decision of the court below in the instant case is in direct conflict with *Smith v. Braley, 76 Okla. 220, 184 P. 586; Apple v. Bridgmen, 122 Okla. 196, 253 P. 1002; Phoenix Insurance Co. v. First National Bank, 129 Okla. 204, 264 P.*

142 and *Sturges, et al. v. Portis Mining Co., 206 Fed. 534.* This conflict was noted and recognized in the opinion of the court below. However, the court below overlooked and abrogated the established and recognized law of decision of Oklahoma by departing from the basic, fundamental concepts and principles relating to the rights and remedies of general judgment creditors.

The only justiciable issue the bank could plead or raise, as a general judgment-creditor, was whether the conveyance from Thomas Faurot to Clyde Faurot was a conveyance in fraud of the creditor bank, the only known creditor of Thomas Faurot. Whether the conveyance was in trust or otherwise is of no fundamental significance. The issue before the state court was whether or not the general warranty deed conveyance was executed and delivered by Thomas Faurot to Clyde Faurot "for the purpose of hindering, delaying or defrauding creditors, particularly the creditor bank." *(Title 24, Okla. Stat. Anno., Sections 7 and 10.)* (R. 170-172.)

Before a justiciable title issue could arise between Thomas Faurot and the estate of Clyde Faurot, Thomas Faurot was required to join issue and litigate the title with the estate of Clyde Faurot. The bank, as a stranger to the title, was nothing more than an interloper, except for its remedy of impressing a judgment lien against the lands conveyed to the extent of its judgment, if the conveyance by Thomas Faurot were fraudulent as to the bank. However, the bank's judgment could not disturb the vested title of the estate of Clyde Faurot beyond satisfy-

ing such judgment out of a sale of the lands, if neither Thomas Faurot nor the estate of Clyde Faurot paid the bank judgment.

It was held in *Apple v. Bridgman, 122 Okla. 196, 253 P. 1002:*

> "Upon proper pleadings raising a controversy between co-defendants, a judgment or decree as between them on such issues is *res adjudicata* in a subsequent action, but a *judgment that a grantor's conveyance as to a creditor was fraudulent does not reinvest the title in the grantor as against his grantee, in the absence of adversary issue.*" (Italics ours.)

[Thomas Faurot filed only a demurrer and was not present personally at the trial (R. 174, 175).]

At page 1003, in the foregoing cited case, the court said:

> "* * * for, it be conceded that said deeds were properly vacated and set aside, the question still remains, Was Plaintiff entitled to the judgment granted him in the trial court? The deed of January 29, 1923, conveyed all his right, title and interest in and to the property, if any he had theretofore held, to the instant defendant, Byron W. Apple. The plaintiff says, however, that said deed was no longer efficacious, for that it had been decreed void in the first-named suit by the plaintiff's creditor, the American National Bank.
>
> "*The question then is, Did the said judgment in favor of the American National Bank, on its said supplemental petition, reinvest title in the said Bridgman, which had been divested by the said first-named deed?* As stated, supra, in the case of the American Nat. Bank v. Bridgman and Byron W. Apple, was that the conveyance of January 29, 1923, was void, as against

Bridgman's creditor, the bank, or, in other words, that the deed was made by Bridgman in fraud of his creditors. Whatever the phraseology of the judgment (and that we shall not prolong this opinion to discuss), it is conceded by all parties to the instant suit that the defendant Byron W. Apple in the first-named suit did not plead against the defendant Bridgman or ask for any affirmative relief as against her. The effect of the judgment in that case was to order the property sold under an attachment that had been levied, unless the judgment in favor of the bank was paid." (Italics ours.)

In the case of *Smith v. Braley, 76 Okla. 220, 184 P. 586,* the court held:

"While a judgment on the merits is final and conclusive as between the parties thereto and their privies, not only as to matters actually litigated, but also as to every ground of recovery or defense which might have been presented and determined therein germane to the issues therein, such judgment does not have the effect of settling matters between co-plaintiffs or co-defendants, unless their conflicting or hostile claims were brought into issue and were actually litigated and adjudicated." 34 C. J. 1040; De Watteville v. Sims, 44 Okla. 708, 146 P. 224.

It was held in *Phoenix Ins. Co. of Hartford, Connecticut v. First National Bank of Stilwell, Oklahoma, 129 Okla. 204, 264 Pac. 142* (syllabus by the court):

"A decree cancelling conveyance in fraud of creditors does not reinvest title in grantor.

"A transfer of property in fraud of creditors, while void as to the latter, is binding on the parties and their privies, and, where such a conveyance is made, the grantor does not retain an insurable interest therein."

At page 144 of that opinion, the court said:

> "(4)—The district court of Adair County having decreed that the conveyance of J. L. Rhodes to his wife was void as to his creditors, did this decree establish or reinvest any title to said property in grantor, J. L. Rhodes? In the trial of that case, there appears to have been no adversary pleadings 'between Rhodes and his wife, no issues litigated between them, and they were in no wise adversary parties. That decree did not disturb the relation between Rhodes and his wife as to the property in question.' Apple v. Bridgman, 122 Okla. 196, 253 P. 1002. In that case it was also held that a decree setting aside a conveyance as void in fraud of creditors did not reinvest the title in the grantor as against the grantee. The rule is that such conveyances are valid and binding as between grantor and grantee, and as to all the world, except they may be questioned by a creditor of the grantor, and then only to the extent that the property conveyed may be subjected to the payment of the grantor's debts."

In *Sturgis, et al. v. Portis Mining Co., 206 Fed. 534, at page 536*, it is stated:

> "No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is binding upon the parties and those in privity with them. The statutes against fraudulent conveyances are designed merely to protect the interest of creditors, and their provisions do not, in any manner, affect the rights of the parties to the conveyance, and these must therefore be determined by the principles of the common law. 14 Am. and Eng. Enc. 274."

At page 537, the court continued:

> "A decree avoiding a deed as to creditors of the grantor leaves the deed operative inter parties. The legal effect of a judgment declaring a conveyance void as against a judgment creditor is not to restore title to the debtor, but to make the property subject in the hands of the grantee to the judgment lien, and clear the way for the judgment creditor to sell in satisfaction thereof.
>
> "A decree setting aside a conveyance as a fraud upon the grantor's creditors does not make the deed invalid as to anyone except such creditors."

The Court of Appeals, under paragraph 4, page 885, of its decision, erred grievously in its findings:

> "* * * In addition to alleging lack of fair and valuable consideration and a fraudulent intent and purpose to hinder and delay the bank in the collection of its debt, the complaint alleged in plain and categorical language that the land was in fact and in equity owned by Thomas Faurot. That sweeping allegation amounted to an implied negation of title and ownership in the estate of Clyde Faurot, or his heirs. And by equally clear terms the prayer expressly sought an adjudication that Thomas Faurot was the sole owner of the land in fee simple. Manifestly, the question whether Thomas Faurot, on one hand, or the estate of Clyde Faurot, or his heirs, on the other, owned the land was tendered and became a justiciable issue in the case. The court was clothed with general equitable jurisdiction to adjudicate and determine the issue * * *."

It is respectfully submitted that the Court of Appeals, in its respected decision, erred grievously in its foregoing findings on three fundamental points:

1. Under Oklahoma law, the bank, as a judgment-creditor, had only the one cause of action given to it by statute *(Title 24, Okla. Stat. Anno., Sections 3, 5, 7, 8, 9 and 10);*

2. Under Oklahoma law, the vested fee simple title of the estate of Clyde Faurot, deceased could not be tendered by the bank and become a justiciable issue in the suit, unless Thomas Faurot and the estate of Clyde Faurot litigated the question of title. (Statutes and cases, supra.)

3. The only justiciable issue that was tendered or could be tendered by the bank, as a judgment-creditor of Thomas Faurot, under Oklahoma law, was as to whether or not the conveyance by Thomas Faurot to Clyde Faurot was in fraud of creditors. (Statutes and cases, supra.)

By overlooking the material phrase in the Bank's petition, "* * * by reasons of the facts hereinabove set forth * * *" (R. 172), the Court of Appeals deprived the pleading of its full context, and gave the language of the petition the illusion of containing two separate causes of action.

This apparent oversight of the Court of Appeals was assigned by petitioners as error in their petition for rehearing (Assignments of Error 3 and 4, R. 189).

As a matter of law, there is no language in the general warranty deed to Clyde Faurot indicating or suggesting a trust for the use or benefit of Thomas Faurot (R. 6-7). Neither Thomas Faurot nor Lois Faurot, administratix of the estate of Clyde Faurot, deceased, was present at the trial (R. 151; 175). There is no record of depositions,

stipulations or admissions in the trial of the case (R. 151; 175-178).

No attachment, foreclosure or sale was ever effected by the bank. Thomas Faurot voluntarily paid off the first judgment of the bank on September 6, 1938 (R. 159). The bank obtained its second judgment March 3, 1936 (R. 151). Yet no process or writ of any kind or character was ever issued by the bank on this judgment. It is respectfully submitted, since the second suit and judgment were predicated upon the first judgment of the bank, that, upon payment and release of the first judgment, the second judgment was in all things extinguished and voided and was of no force and effect.

III

The second suit of the bank was based and predicated upon the first unsatisfied judgment of the bank against Thomas Faurot. This is clearly manifest from the allegations of the Bank's second petition (R. 170-172).

Aside from the fact that no execution was ever issued on this first judgment, the question as to whether or not the bank had a valid first judgment at the time the second suit was instituted, arises (R. 147; 158-159).

Only a Civil Appearance Docket entry on April 10, 1935, was made: "Enter order rendering judgment as per J. E. .10" (R. 147).

The journal entry itself was not entered or recorded until November 6, 1942 (R. 147; 159). The journal entry makes no mention of a nunc pro tunc order (R. 158-159). There

is no nunc pro tunc order in the record and none could be found.

Title 12, Oklahoma Statutes Annotated, Section 701, provides:

> "All judgments and orders must be entered on the Journal of the court, and specify clearly the relief granted or order made in the action."

The notation on the Civil Appearance Docket fails to state for whom the judgment was rendered, plaintiff or defendant (R. 147).

Therefore, nothing but a clerk's minutes existed referring to the first judgment when the second judgment in question was obtained.

News Dispatch Printing and Audit Co. v. Board of Commissioners of Carter County, 132 Okla. 216, 270 Pac. 2, states in the syllabus, by the court, the law in Oklahoma:

> "A mere recital, in the clerk's minutes, as follows: 'The court renders judgment for the defendants as per Journal Entry to be filed,' transcribed into the record, does not constitute a judgment, and where no judgment of the trial court appears in the record, this Court has no jurisdiction to review the case on appeal."

Merchants Southwest Fireproof Warehouse Co. v. Johnston, 113 Okla. 146, 243 Pac. 186, states in the syllabus by the court:

> "A mere recital in the clerk's minutes, transcribed into the record does not constitute a judgment, * * *."

Thus the very basis for the second judgment, on which Respondents rely, is the first bank judgment, and it did

not exist as a judgment until seven years later when a release had already been filed.

IV

Clyde Faurot died intestate. The title to one-half of the land vested in Nancy Faurot, the one-year-old daughter of Clyde Faurot, the instant Clyde Faurot died. The child was not made a party to the suit. No guardianship existed.

The bank judgment which sought to divest this child of its title to the land was not based upon any service upon the petitioners.

Title 12, Oklahoma Statutes Annotated, Section 169, provides:

> "When the defendant is a minor, under the age of fourteen years, the service must be upon him and upon his guardian or father, or if neither of those can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives * * *."

Echols v. Reesburgh, 62 Okla. 67, 161 Pac. 1065, states the law in Oklahoma, that an appearance cannot be made for an infant before service of process.

> "An infant cannot waive the issuance and service of summons required by this section (referred to above) nor can any person, not even his guardian, do so for him." Tanner v. Schults, 97 Okla. 132, 223 Pac. 174, and Taylor v. Scott, 83 Okla. 30 Pac. 427.

A judgment taking property from a minor without service of summons is clearly taking property without due

process of law in violation of the Constitution of the United States.

V

None of the Respondents is, was or can claim to be either an innocent or a bona fide purchaser, lender or holder for value in that each and all of Respondents acted in their respective capacity in dealing with the lands involved in this suit with actual, constructive and record notice of Petitioners' duly recorded general warranty deed on file with the County Clerk of Woods County, Okla., evidencing a superior and paramount fee simple title vested in Petitioners in and to said land.

CONCLUSION

For the foregoing reasons, this petition for a certiorari should be granted.

Respectfully submitted,

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